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NORTHERN DISTRICT OF CALIFORNIA
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22 UNITED STATES DISTRICT COURT
 23 NORTHERN DISTRICT OF CALIFORNIA
 24 SAN FRANCISCO / OAKLAND DIVISION

JCS

25 MARTIN LEWIS and AARON COOPER
 26 on behalf of themselves and a class of
 27 those similarly situated,

28 Plaintiffs,

v.

WELLS FARGO & CO.,

Defendant.

Case No. 08-2670

**COMPLAINT FOR VIOLATIONS OF
 FLSA, ERISA, AND CALIFORNIA WAGE
 AND HOUR LAWS; CLAIMS FOR
 DAMAGES, RESTITUTION AND
 INJUNCTIVE RELIEF**

COLLECTIVE ACTION

CLASS ACTION

DEMAND FOR JURY TRIAL

1 Plaintiffs Martin Lewis and Aaron Cooper ("Plaintiffs") allege, on behalf of
2 themselves and a class of those similarly situated, as follows:

3 **JURISDICTION AND VENUE**

4 1. This Court has federal question jurisdiction over this action pursuant to
5 28 U.S.C. § 1331; Section 16(b) of the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 216(b);
6 and Section 501(e)(1) of the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C.
7 § 1132(e)(1).

8 2. This Court also has original jurisdiction over this action under the Class
9 Action Fairness Act, 28 U.S.C. § 1332(d), because this is a class action in which: (1) there are
10 100 or more members in the proposed class; (2) at least some members of the proposed class have
11 a different citizenship from Defendant; and (3) the claims of the proposed class members exceed
12 \$5,000,000 in the aggregate.

13 3. In addition, this Court has supplemental jurisdiction under 28 U.S.C. §
14 1367 over Plaintiffs' California wage and hour law claims, because those claims derive from a
15 common nucleus of operative fact.

16 4. This Court is empowered to issue a declaratory judgment pursuant to
17 28 U.S.C. §§ 2201 and 2202.

18 5. The Northern District of California has personal jurisdiction over Wells
19 Fargo & Co. ("Defendant" or "Wells Fargo"), because it is headquartered in San Francisco,
20 California, is doing business in California, and in this district, and because many of the acts
21 complained of and giving rise to the claims alleged occurred in California and in this District.

22 6. Venue is proper in this district pursuant to 28 U.S.C. § 1391(b) because
23 Defendant resides in this district and because a substantial part of the events giving rise to the
24 claims occurred in this District.

25 7. Intradistrict assignment: Pursuant to N.D. Cal. Local Rule 3-2(c) and (d),
26 intradistrict assignment to the San Francisco / Oakland Division is proper because a substantial
27 part of the events that give rise to the claims asserted occurred in San Francisco.
28

SUMMARY OF CLAIMS

8. Plaintiffs were employed by Wells Fargo as Network Engineers. Network Engineers at Wells Fargo have the primary duties of installing, maintaining, and/or supporting computer software and/or hardware for Wells Fargo. They were and/or are misclassified by Wells Fargo as exempt from the overtime provisions of the FLSA and/or the applicable state wage and hour laws of California, as described below.

9. Plaintiffs bring this action on behalf of themselves and all persons who were, are, or will be employed by Wells Fargo nationwide as technical support workers with the primary duties of installing, maintaining, and/or supporting computer software and/or hardware, including but not limited to Network Engineers, but excluding PC/LAN Engineers (collectively, the "Class Positions"), at any time within the three years prior to the filing of this Complaint through the date of the final disposition of this action (the "Nationwide FLSA Period"), and who were, are, or will be misclassified by Wells Fargo as exempt from overtime pay under federal law. This group is hereinafter referred to as the "Nationwide FLSA Collective Plaintiffs."

10. Plaintiffs also bring this action on behalf of all persons who were, are, or will be employed by Wells Fargo in California in the Class Positions (hereinafter "the California Class"), at any time within the four years prior to the date of the filing of this Complaint through the date of the final disposition of this action (the "California Class Period"), and who were, are, or will be improperly misclassified as exempt from overtime pay under California law.

11. Plaintiffs also bring this action on behalf of themselves and all persons who were, are, or will be employed by Defendant nationwide in the Class Positions within the six years prior to this action's filing date through the date of the final disposition of this action ("the ERISA Class Period"), who were, are, or will be improperly classified as exempt from overtime pay under applicable state and federal laws, and who were, are, or will be covered by the Wells Fargo Cash Balance Plan ("the 401(k) Plan") (hereinafter "the ERISA Class").

12. At all relevant times, Defendant has been the plan sponsor of the 401(k) Plan within the meaning of ERISA § 3(16)(B), 29 U.S.C. § 1002(16)(B). On information and belief, Defendant has exercised actual responsibility, authority, and/or control with regard to the

1 crediting of compensation under the 401(k) Plan, thereby making it a fiduciary of that plan within
2 the meaning of ERISA § 3(21), 29 U.S.C. § 1002(21).

3 13. On information and belief, Defendant, at all relevant times, has been and
4 continues to be an employer within the meaning of ERISA § 3(5), 29 U.S.C. § 1002(5), the
5 administrator of the 401(k) Plan, within the meaning of ERISA § 3(16)(A), 29 U.S.C. §
6 1002(16)(A), the named fiduciary of that plan within the meaning of ERISA § 402(a)(1), 29
7 U.S.C. § 1102(a)(1), and a fiduciary of that plan within the meaning of ERISA § 3(21), 29 U.S.C.
8 § 1002(21).

9 14. At all relevant times, Plaintiffs were employees of Defendant, within the
10 meaning of ERISA § 3(6), 29 U.S.C. § 1002(6), and a participant in the 401(k) Plan within the
11 meaning of ERISA § 3(7), 29 U.S.C. § 1102(7).

12 15. Defendant has unlawfully classified Plaintiffs, the Nationwide FLSA
13 Collective Plaintiffs, and the California Class members as exempt from overtime payments under
14 federal and California Laws, despite the fact that they are not exempt. Plaintiffs, the Nationwide
15 FLSA Collective Plaintiffs, and the California Class members worked overtime hours, as defined
16 by the applicable federal and California laws, and are and have been entitled to premium
17 compensation at one and one-half times the regular hourly rate ("overtime compensation") for
18 hours over forty in a week and between eight and twelve in a day, and at twice the regular hourly
19 rate for overtime hours over twelve in a day.

20 16. Defendant has willfully refused to pay Plaintiffs, Nationwide FLSA
21 Collective Plaintiffs, and the California Class members the required overtime compensation for
22 overtime hours worked, and has failed to keep time records as required by law.

23 17. Defendant has failed to keep records of Plaintiffs' and the ERISA Class's
24 overtime work. In doing so, Defendant has failed to comply with ERISA's requirement that they
25 maintain records sufficient to determine benefits due or which may become due under the 401(k)
26 Plan, as required under ERISA § 209, 29 U.S.C. § 1059.

18. Defendant has failed to credit Plaintiffs and the ERISA Class for overtime work as Compensation under the 401(k) Plan. In doing so, Defendant has violated ERISA's fiduciary requirement, set forth in ERISA § 404, 29 U.S.C. § 1104.

19. Defendant's practices violate the FLSA, ERISA, and the California laws pled herein. Plaintiffs seeks injunctive and declaratory relief, overtime compensation for all overtime work required, suffered, or permitted by Defendant, liquidated and/or other damages and penalties as permitted by applicable law, interest, and attorneys' fees and costs.

THE PARTIES

20. Plaintiff Martin Lewis was employed by Wells Fargo in Roseville, California from approximately September 2000 to December 2007 as a Network Engineer. Mr. Lewis had the primary duties of installing, maintaining, and supporting computer software and/or hardware. He worked for Wells Fargo in a Class Position during the FLSA Class Period, the ERISA Class Period, and the California Class Period. Mr. Lewis worked hours in excess of forty hours per week and in excess of eight hours per day, without receiving overtime compensation as required by both California and federal law.

21. Plaintiff Aaron Cooper was employed by Wells Fargo in Roseville, California from approximately November 2001 to September 2007 as a Network Engineer. Mr. Cooper had the primary duties of installing, maintaining, and supporting computer software and/or hardware. He worked for Wells Fargo in a Class Position during the FLSA Class Period, the ERISA Class Period, and the California Class Period. Mr. Cooper worked hours in excess of forty hours per week and in excess of eight hours per day, without receiving overtime compensation as required by both California and federal law.

22. Plaintiffs consent to sue for violations of the FLSA, pursuant to 29 U.S.C. § 216(b) and 256.

23. Defendant Wells Fargo is a corporation providing banking services throughout the United States and the world, with its corporate headquarters located in San Francisco, California. The practices described herein were performed in and emanated from Wells Fargo's headquarters in San Francisco, California.

COLLECTIVE ACTION ALLEGATIONS

24. Plaintiffs bring the First Claim for Relief for violation of the FLSA as a collective action pursuant to Section 16(b) of the FLSA, 29 U.S.C. § 216(b), on behalf of all Nationwide FLSA Collective Plaintiffs.

25. Plaintiffs and Nationwide FLSA Collective Plaintiffs are similarly situated in that they have substantially similar job requirements and pay provisions, and are subject to Defendant Wells Fargo's common practice, policy, or plan of unlawfully characterizing Nationwide FLSA Collective Plaintiffs as exempt employees and refusing to pay them overtime in violation of the FLSA.

26. The First Claim for Relief for violations of the FLSA may be brought and maintained as an "opt-in" collective action pursuant to § 16(b) of FLSA, 29 U.S.C. § 216(b), since the claims of the Plaintiffs are similar to the claims of the Nationwide FLSA Collective Plaintiffs.

27. The names and addresses of the Nationwide FLSA Collective Plaintiffs are available from Wells Fargo's records. Notice should be provided to the Nationwide FLSA Collective Plaintiffs via both first class mail and posting in the offices where they have worked as soon as possible.

CALIFORNIA CLASS ACTION ALLEGATIONS

28. Plaintiffs bring the Second, Third, Fourth, Fifth, and Sixth Claims for Relief for violation of California's wage and hour and unfair competition laws as a class action, pursuant to Fed. R. Civ. P.23 (a), (b)(2), and (b)(3), on behalf of all California Class members, defined in paragraph 10.

29. The California Class is so numerous that joinder of all members is impracticable. Plaintiffs are informed and believe, and on that basis allege, that during the California Class Period Defendant Wells Fargo has employed at least fifty persons who satisfy the definition of the California Class.

30. Common questions of law and fact exist as to members of the California Class, including, but not limited to, the following:

1 a. Whether Defendant unlawfully failed to pay overtime compensation
2 in violation of the California Unfair Competition Law, Cal. Bus. & Prof. Code §§ 17200 *et seq.*,
3 and the California Labor Code and related regulations, Cal. Labor Code §§ 201, 202, 203, 226,
4 510, 1174, 1174.5, and 1194, Cal. Wage Order No. 4-2001.

5 b. Whether Plaintiffs and the California Class members are non-
6 exempt employees entitled to overtime compensation for overtime hours worked under the
7 overtime pay requirements of California law;

8 c. Whether Wells Fargo's policy and practice of classifying the
9 California Class members as exempt from overtime entitlement under California law and Wells
10 Fargo's policy and practice of failing to pay overtime to the California Class members violate
11 applicable provisions of California law, including applicable statutory and regulatory authority;

12 d. Whether Wells Fargo unlawfully failed to keep and furnish
13 California Class members with records of hours worked, in violation of Labor Code §§ 226 and
14 1174;

15 e. Whether Wells Fargo's policy and practice of failing to pay its
16 employees all wages due within the time required by law after their employment ended violates
17 California law; and

18 f. The proper measure of damages sustained and the proper measure
19 of restitution recoverable by members of the California Class.

20 31. Plaintiffs' claims are typical of the California Class members' claims.
21 Plaintiffs, like other California Class members, were subjected to Wells Fargo's policy and
22 practice of refusing to pay overtime in violation of California law. Plaintiffs' job duties were
23 typical of those of other California Class members.

24 32. Plaintiffs will fairly and adequately represent and protect the interests of
25 the California Class. Plaintiffs have retained counsel competent and experienced in complex
26 class actions, the FLSA and state labor and employment litigation.

27 33. Class certification of the Second, Third, Fourth, Fifth, and Sixth Claims for
28 Relief is appropriate pursuant to Fed. R. Civ. P. 23(b)(2) because Wells Fargo has acted or

1 refused to act on grounds generally applicable to the California Class, making appropriate
2 declaratory and injunctive relief with respect to Plaintiffs and the California Class members as a
3 whole. Plaintiffs and the California Class members are entitled to injunctive relief to end Wells
4 Fargo's common and uniform practice of failing to properly compensate its employees for all
5 overtime work performed for the benefit of Wells Fargo.

6 34. Class certification of the Second, Third, Fourth, Fifth, and Sixth Claims for
7 Relief is also appropriate under Fed. R. Civ. P. 23(b)(3) because questions of law and fact
8 common to the California Class predominate over any questions affecting only individual
9 members of the California Class, and because a class action is superior to other available methods
10 for the fair and efficient adjudication of this litigation. Wells Fargo's common and uniform
11 policies and practices unlawfully treat members of the California Class as exempt from overtime
12 pay requirements. The damages suffered by individual California Class members are small
13 compared to the expense and burden of individual prosecution of this litigation. In addition, class
14 certification is superior because it will obviate the need for unduly duplicative litigation that
15 might result in inconsistent judgments about Wells Fargo's practices.

16 35. Plaintiffs intend to send notice to all members of the California Class
17 consistent with the requirements of Fed. R. Civ. P. 23.

18 **ERISA CLASS ACTION ALLEGATIONS**

19 36. Plaintiffs bring the Seventh and Eighth Claims for Relief for violation of
20 ERISA as a class action, pursuant to Fed. R. Civ. P. 23 (a), (b)(1), and/or (b)(2), on behalf of all
21 ERISA Class members, defined in paragraph 11.

22 37. The ERISA Class is so numerous that joinder of all members is
23 impracticable. Plaintiffs are informed and believe that during the ERISA Class Period, Defendant
24 employed over 100 persons who satisfy the definition of the ERISA Class.

25 38. Questions of law and fact common to the ERISA Class as a whole include,
26 but are not limited to, the following:

27 a. Whether Defendant failed and continues to fail to maintain accurate
28 records of actual time worked and wages earned by Plaintiffs and the ERISA Class;

1 b. Whether Defendant failed and continues to fail to provide accurate
2 wage statements itemizing all actual time worked and wages earned by Plaintiffs and the ERISA
3 Class;

4 c. Whether Defendant has violated and continues to violate ERISA
5 § 209(a)(1), 29 U.S.C. § 1059(a)(1), as alleged herein;

6 d. Whether Defendant credited Plaintiffs and the ERISA Class with all
7 Compensation which they were paid or entitled to be paid for purposes of the 401(k) Plan, as
8 required by ERISA; and

9 e. Whether Defendant violated ERISA's fiduciary standards by its
10 failure to credit Plaintiffs and the ERISA Class with all Compensation which they were paid or
11 entitled to be paid for purposes of the 401(k) Plan, as required by ERISA.

12 39. Plaintiffs' claims are typical of those of the ERISA Class. Plaintiffs, like
13 all other ERISA Class members, were subject to Defendant's policies and practices of failing to
14 record overtime worked and Defendant's policy and practice of failing to credit all overtime
15 compensation earned or owing as Compensation under the 401(k) Plan.

16 40. Plaintiffs will fairly and adequately represent and protect the interests of
17 the ERISA Class. Plaintiffs have retained counsel competent and experienced in complex class
18 actions and ERISA.

19 41. Class certification of the Seventh and Eighth Claims for Relief is
20 appropriate pursuant to Fed. R. Civ. P. 23(b)(1) because adjudications with respect to individual
21 members of the class would, as a practical matter, be dispositive of the interests of the other
22 members and/or pursuant to Fed. R. Civ. P. 23(b)(2) because Defendant acted or refused to act on
23 grounds generally applicable to the ERISA Class, making appropriate declaratory and injunctive
24 relief with respect to the Plaintiffs and the ERISA Class as a whole.

25 42. Plaintiffs intend to send notice to all members of the ERISA Class
26 consistent with the requirements of Fed. R. Civ. P. 23.

FIRST CLAIM FOR RELIEF
(Fair Labor Standards Act, 29 U.S.C. §§ 201 et seq.,
Brought by Plaintiffs on Behalf of
Themselves and the Nationwide FLSA Collective Plaintiffs)

43. Plaintiffs, on behalf of themselves and all Nationwide FLSA Collective Plaintiffs, reallege and incorporate by reference paragraphs 1 through 42 as if they were set forth again herein.

44. At all relevant times, Wells Fargo has been, and continues to be, an “employer” engaged in interstate “commerce” and/or in the production of “goods” for “commerce,” within the meaning of the FLSA, 29 U.S.C. § 203. At all relevant times, Wells Fargo has employed, and continues to employ, “employee[s],” including Plaintiffs, and each of the collective Nationwide FLSA Collective Plaintiffs. At all relevant times, Wells Fargo has had gross operating revenues in excess of \$500,000.

45. Attached hereto are the Consent to Sue forms signed by Plaintiffs in this action pursuant to § 16(b) of the FLSA, 29 U.S.C. §§ 216(b) and 256. It is likely that other similarly situated individuals will sign consent forms and join as Plaintiffs on this claim in the future.

46. The FLSA requires each covered employer, including Defendant Wells Fargo, to compensate all non-exempt employees at a rate of not less than one and one-half times the regular rate of pay for work performed in excess of forty hours in a workweek.

47. The Nationwide FLSA Collective Plaintiffs are entitled to be paid overtime compensation for all overtime hours worked.

48. At all relevant times, Wells Fargo, pursuant to its policies and practices, failed and refused to pay overtime premiums to the Nationwide FLSA Collective Plaintiffs for their hours worked in excess of forty hours per week.

49. By failing to compensate Plaintiffs and the Nationwide FLSA Collective Plaintiffs at a rate not less than one and one-half times the regular rate of pay for work performed in excess of forty hours in a workweek, Wells Fargo has violated, and continues to violate, the FLSA, 29 U.S.C. §§ 201 et seq., including 29 U.S.C. § 207(a)(1) and § 215(a).

1 50. By failing to record, report, and/or preserve records of hours worked by
2 Plaintiffs and the Nationwide FLSA Collective Plaintiffs, Wells Fargo has failed to make, keep,
3 and preserve records with respect to each of its employees sufficient to determine their wages,
4 hours, and other conditions and practice of employment, in violation of the FLSA, 29 U.S.C.
5 §§ 201 *et seq.*, including 29 U.S.C. § 211(c) and § 215(a).

6 51. The foregoing conduct, as alleged, constitutes a willful violation of the
7 FLSA within the meaning of 29 U.S.C. § 255(a).

8 52. Plaintiffs, on behalf of themselves and the Nationwide FLSA Collective
9 Plaintiffs, seek recovery of attorneys' fees and costs of action to be paid by Wells Fargo, as
10 provided by the FLSA, 29 U.S.C. § 216(b).

11 53. Plaintiffs, on behalf of themselves and Nationwide FLSA Collective
12 Plaintiffs, seek damages in the amount of their respective unpaid overtime compensation,
13 liquidated damages as provided by the FLSA, 29 U.S.C. § 216(b), interest, and such other legal
14 and equitable relief as the Court deems just and proper.

15 **SECOND CLAIM FOR RELIEF**
16 **(Cal. Wage Order No. 4-2001; Cal. Labor Code §§ 510, 1194,**
 Brought by Plaintiffs on Behalf of Themselves and the California Class)

17 54. Plaintiffs, on behalf of themselves and all members of the California Class,
18 reallege and incorporate by reference paragraphs 1 through 53 as if they were set forth again
19 herein.

20 55. California law requires an employer, such as Defendant, to pay overtime
21 compensation to all non-exempt employees for all hours worked over forty per week, or over
22 eight per day.

23 56. Plaintiffs and the California Class members are non-exempt employees
24 entitled to be paid overtime compensation for all overtime hours worked.

25 57. Throughout the California Class Period, and continuing through the
26 present, Plaintiffs and the California Class members worked in excess of eight hours in a workday
27
28

1 and/or forty hours in a workweek. Plaintiffs and certain California Class members also worked in
2 excess of twelve hours in a workday.

3 58. During the California Class Period, Defendant misclassified Plaintiffs and
4 the California Class members as exempt from overtime pay entitlement and failed and refused to
5 pay them overtime premium pay for their overtime hours worked.

6 59. As a direct and proximate result of Defendant's unlawful conduct, as set
7 forth herein, Plaintiffs and the California Class members have sustained damages, including loss
8 of earnings for hours of overtime worked on behalf of Defendant in an amount to be established
9 at trial, prejudgment interest, and costs and attorneys' fees, pursuant to statute and other
10 applicable law.

11 **THIRD CLAIM FOR RELIEF**
12 **(California Wage Payment Provisions, Cal. Labor Code §§ 201, 202, & 203,**
13 **Brought by Plaintiffs on Behalf of Themselves and the California Class)**

14 60. Plaintiffs, on behalf of themselves and all members of the California Class,
15 reallege and incorporate by reference paragraphs 1 through 59 as if they were set forth again
16 herein.

17 61. California Labor Code §§ 201 and 202 require Defendant to pay its
18 employees all wages due within the time specified by law. California Labor Code § 203 provides
19 that if an employer willfully fails to timely pay such wages, the employer must continue to pay
20 the subject employees' wages until the back wages are paid in full or an action is commenced, up
21 to a maximum of thirty days of wages.

22 62. Plaintiffs and all California Class members who ceased employment with
23 Wells Fargo are entitled to unpaid compensation, but to date have not received such
24 compensation.

25 63. More than thirty days have passed since Plaintiffs and certain California
26 Class members left Defendant's employ.

27 64. As a consequence of Defendant's willful conduct in not paying
28 compensation for all hours worked, Plaintiffs and California Class members whose employment

ended during the class period are entitled to thirty days' wages under Labor Code § 203, together with interest thereon and attorneys' fees and costs.

FOURTH CLAIM FOR RELIEF
(California Record-Keeping Provisions,
Cal. Wage Order No. 4-2001; Cal. Labor Code §§ 226, 1174, & 1174.5,
Brought by Plaintiffs on Behalf of Themselves and the California Class)

65. Plaintiffs, on behalf of themselves and all members of the California Class, reallege and incorporate by reference paragraphs 1 through 64 as if they were set forth again herein.

66. Defendant knowingly and intentionally failed to provide timely, accurate, itemized wage statements including, *inter alia*, hours worked, to Plaintiffs and California Class members in accordance with Labor Code § 226(a) and the IWC Wage Orders. Such failure caused injury to Plaintiffs and California Class members, by, among other things, impeding them from knowing the amount of wages to which they are and were entitled. At all times relevant herein, Defendant has failed to maintain records of hours worked by Plaintiffs and California Class members as required under Labor Code § 1174(d).

67. Plaintiffs and California Class members are entitled to and seek injunctive relief requiring Defendant to comply with Labor Code §§ 226(a) and 1174(d), and further seek the amount provided under Labor Code §§ 226(e) and 1174.5, including the greater of all actual damages or fifty dollars (\$50) for the initial pay period in which a violation occurred and one hundred dollars (\$100) per employee for each violation in a subsequent pay period.

FIFTH CLAIM FOR RELIEF
(California Meal And Rest Period Provisions,
Cal. Wage Order No. 4-2001; Cal. Labor Code §§ 218.5, 226.7, & 512,
Brought by Plaintiffs on Behalf of Themselves and the California Class)

68. Plaintiffs, on behalf of themselves and all members of the California Class, reallege and incorporate by reference paragraphs 1 through 67 as if they were set forth again herein.

69. Plaintiffs and California Class members regularly work and have worked in excess of five-hour shifts without being afforded at least a half-hour meal break in which they

1 were relieved of all duty, as required by Labor Code §§ 226.7 and 512 and Wage Order No. 4-
2 2001, § 11(a).

3 70. In addition, Plaintiffs and California Class members regularly work and
4 have worked without being afforded at least one ten-minute rest break, in which they were
5 relieved of all duty, per four hours of work performed or major fraction thereof, as required by
6 Labor Code §§ 226.7 and Wage Order No. 4-2001, § 12.

7 71. As a result of Defendant's failure to afford proper meal periods, it is liable
8 to Plaintiffs and the California Class members for one hour of additional pay at the regular rate of
9 compensation for each workday that the proper meal periods were not provided, pursuant to
10 Labor Code § 226.7 and Wage Order No. 4-2001, § 11(b).

11 72. As a result of Defendant's failure to afford proper rest periods, it is liable to
12 Plaintiffs and the California Class members for one hour of additional pay at the regular rate of
13 compensation for each workday that the proper rest periods were not provided, pursuant to Labor
14 Code § 226.7 and Wage Order No. 4-2001, § 12(b).

15 **SIXTH CLAIM FOR RELIEF**
16 **(California Unfair Competition Law, Cal. Bus. & Prof. Code §§17200 et seq.,**
17 **Brought by Plaintiffs on Behalf of Themselves and the California Class)**

18 73. Plaintiffs, on behalf of themselves and all members of the California Class,
19 reallege and incorporate by reference paragraphs 1 through 72 as if they were set forth again
20 herein.

21 74. The foregoing conduct, as alleged, violates the California Unfair
22 Competition Law ("UCL"), Cal. Bus. & Prof. Code §§ 17200 *et seq.* Section 17200 of the Cal.
23 Bus. & Prof. Code prohibits unfair competition by prohibiting, *inter alia*, any unlawful or unfair
24 business acts or practices.

25 75. Beginning at a date unknown to Plaintiffs, but at least as long ago as four
26 years before the filing of this action, Defendant committed, and continues to commit, acts of
27 unfair competition, as defined by the UCL, by, among other things, engaging in the acts and
28 practices described herein. Defendant's conduct as herein alleged has injured Plaintiffs and the

1 California Class by wrongfully denying them earned wages, and therefore was substantially
2 injurious to Plaintiffs and to the California Class.

3 76. Defendant engaged in unfair competition in violation of the UCL by
4 violating, *inter alia*, each of the following laws. Each of these violations constitutes an
5 independent and separate violation of the UCL:

- 6 a. The Fair Labor Standards Act, 29 U.S.C. §§ 201 *et seq.*;
- 7 b. California Labor Code § 1194;
- 8 c. California Labor Code §§ 201, 202, 203, 204, and 226;
- 9 d. California Labor Code § 1174; and
- 10 e. California Labor Code § 510, which provides in relevant part:

11 Any work in excess of eight hours in one workday and any
12 work in excess of 40 hours in any one workweek and the
13 first eight hours worked on the seventh day of work in any
14 one workweek shall be compensated at the rate of no less
15 than one and one-half times the regular rate of pay for an
16 employee. Any work in excess of 12 hours in one day shall
be compensated at the rate of no less than twice the regular
rate of pay for an employee. In addition, any work in
excess of eight hours on any seventh day of a workweek
shall be compensated at the rate of no less than twice the
regular rate of pay of an employee.

17 77. Defendant's course of conduct, acts, and practices in violation of the
18 California laws mentioned in the above paragraph constitute a separate and independent violation
19 of the UCL. Defendant's conduct described herein violates the policy or spirit of such laws or
20 otherwise significantly threatens or harms competition.

21 78. The unlawful and unfair business practices and acts of Defendant,
22 described above, have injured the California Class members in that they were wrongfully denied
23 the payment of earned overtime wages.

24 79. Plaintiffs, on behalf themselves and the California Class members, seek
25 recovery of attorneys' fees and costs of this action to be paid by Wells Fargo, as provided by the
26 UCL and California Labor Code §§ 218, 218.5, and 1194.

27 80. Plaintiffs, on behalf of themselves and the California Class, seek restitution
28 in the amount of the respective unpaid wages earned and due at a rate not less than one and one-

1 half times the regular rate of pay for work performed in excess of forty hours in a workweek, or
2 eight hours in a day, and double the regular rate of pay for work performed in excess of twelve
3 hours per day.

4 **SEVENTH CLAIM FOR RELIEF**
5 **(ERISA § 502(a)(3) Based on Failure to Maintain Records**
6 **Brought by Plaintiffs**
7 **on Behalf of Themselves and the ERISA Class)**

8 81. Plaintiffs, on behalf of themselves and the ERISA Class, reallege and
9 incorporate by reference paragraphs 1 through 80 as if they were set forth again herein.

10 82. ERISA § 209(a)(1), 29 U.S.C. § 1059(a)(1), requires that an employer
11 which sponsors an employee benefit plan maintain records with respect to each of its employees
12 sufficient to determine the benefits due or which may become due to such employees.

13 83. On information and belief, the 401(k) Plan is an employee pension benefit
14 plan within the meaning of ERISA § 3(2), 29 U.S.C. § 1002(2), and an employee benefit plan
15 within the meaning of ERISA § 3(3), 29 U.S.C. § 1002(3).

16 84. Pursuant to the terms of the 401(k) Plan, employees' rights to share in the
17 contributions to the Plan are dependent, in part, on their Compensation, which is defined by
18 Section 1.1(j) of the Plan's governing instrument to include, among other things, employees'
19 overtime wages.

20 85. By its failure to record and/or report all of the hours worked by Plaintiffs
21 and members of the prospective ERISA Class, Defendant has failed to maintain records with
22 respect to each of its employees sufficient to determine the benefit accrual rights of 401(k) Plan
23 participants, in violation of ERISA § 209(a)(1), 29 U.S.C. § 1059(a)(1).

24 86. In order to remedy this violation of ERISA by Defendant, Plaintiffs on
25 behalf of themselves and members of the ERISA Class seek injunctive relief, and such other
26 equitable relief as the Court deems just and proper, as provided by Section 502(a)(3) of ERISA,
27 29 U.S.C. § 1132(a)(3).
28

87. Plaintiffs on behalf of themselves and members of the ERISA Class seek recovery of their attorneys' fees and costs of action to be paid by Defendant, as provided by Section 502(g)(1) of ERISA, 29 U.S.C. § 1132(g)(1).

EIGHTH CLAIM FOR RELIEF
(ERISA §§ 1001 *et seq.*
Brought by Plaintiffs
on Behalf of Themselves and the ERISA Class)

88. Plaintiffs, on behalf of themselves and the ERISA Class, reallege and incorporate by reference paragraphs 1 through 87 as if they were set forth again herein.

89. ERISA § 404(a)(1), 29 U.S.C. § 1104(a)(1), requires that employee benefit plan fiduciaries discharge their duties with respect to the plan solely in the interest of the participants and beneficiaries and, inter alia, (1) for the exclusive purpose of providing benefits to participants and their beneficiaries and defraying reasonable expenses of administration; (2) with the care, skill, prudence, and diligence under the circumstances that a prudent person acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of like character and with like aims; and (3) in accordance with the documents and instruments governing the plan.

90. On information and belief, Article 5 and Article 6 of the governing instrument of the 401(k) Plan confers on Defendant discretionary authority, responsibility, and/or control with respect to the crediting of compensation, thereby rendering Defendant a fiduciary in that regard.

91. On further information and belief, Defendant has exercised actual discretionary authority, responsibility, and/or control in determining what compensation would and would not be credited under the 401(k) Plan. By reason of the exercise of such discretion, Defendant has been a fiduciary of that plan with respect to the crediting of compensation.

92. Defendant has breached its fiduciary duties by failing to credit compensation due for overtime performed by the Plaintiffs and the members of the ERISA Class as Compensation under the 401(k) Plan.

93. Pursuant to ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3), the Plaintiffs on behalf of themselves and all members of the ERISA Class seek an injunction requiring Defendant to credit all members of the ERISA Class with Compensation under the 401(k) Plan for all of the past and future overtime work performed by those Class members and any such other equitable relief as this Court deems appropriate.

94. Plaintiffs on behalf of themselves and members of the ERISA Class, seek recovery of their attorneys' fees and costs of action to be paid by Defendant, as provided by Section 502(g)(1) of ERISA, 29 U.S.C. § 1132(g)(1).

NINTH CLAIM FOR RELIEF
(Breach of Contract,
Brought by Plaintiffs Individually)

95. Plaintiffs, on behalf of themselves individually, reallege and incorporate by reference paragraphs 1 through 94 as if they were set forth again herein.

96. The Wells Fargo & Company Salary Continuation Pay Plan (the "SCPP") constitutes a contract between Plaintiffs and Wells Fargo. The SCPP provides that an employee whose position is eliminated or substantial changed is eligible for salary continuation in the amount of 6 to 15 months of salary, based on the employee's years of service to Wells Fargo.

97. Plaintiffs have attempted to assert their rights to compensation under the SCPP.

98. Wells Fargo has to date failed to provide the compensation payable under the SCPP. Such failure by Wells Fargo constitutes a breach of contract.

99. Wells Fargo's breach of contract has proximately caused Plaintiffs economic injury and other damages.

100. Plaintiffs, on behalf of themselves individually, seek damages and other relief as appropriate.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs on behalf of themselves and all members of the Nationwide FLSA Class, pray for relief as follows:

1 A. Designation of this action as a collective action on behalf of the
2 Nationwide FLSA Collective Plaintiffs (asserting FLSA claims) and prompt issuance of notice
3 pursuant to 29 U.S.C. § 216(b) to all similarly situated members of the FLSA Opt-In Class,
4 apprising them of the pendency of this action, and permitting them to assert timely FLSA claims
5 in this action by filing individual Consent to Sue forms pursuant to 29 U.S.C. § 216(b);

6 B. Designation of Plaintiffs as Representatives of the Nationwide FLSA
7 Collective Plaintiffs;

8 C. A declaratory judgment that the practices complained of herein are
9 unlawful under the FLSA;

10 D. An award of damages, according to proof, including liquidated damages, to
11 be paid by Defendant;

12 E. Costs of action incurred herein, including expert fees;

13 F. Attorneys' fees, including fees pursuant to 29 U.S.C. § 216;

14 G. Post-Judgment interest, as provided by law; and

15 H. Such other legal equitable relief as this Court deems necessary, just, and
16 proper.

17 WHEREFORE, Plaintiffs on behalf of themselves and all members of the
18 California Class, pray for relief as follows:

19 I. Certification of this action as a class action on behalf of the California
20 Class;

21 J. Designation of Plaintiffs as Representatives of the California Class;

22 K. A declaratory judgment that the practices complained of herein are
23 unlawful under California law;

24 L. Appropriate equitable and injunctive relief to remedy Defendant's
25 violations of California law, including but not necessarily limited to an order enjoining Defendant
26 from continuing its unlawful practices;

27 M. Appropriate statutory penalties;

1 N. Damages and restitution, including waiting time penalties, meal and rest
2 break violation payments, record-keeping penalties, and overtime wages to be paid by Defendant
3 according to proof;

4 O. Pre-Judgment and Post-Judgment interest, as provided by law;

5 P. Such other injunctive and equitable relief as the Court may deem just and
6 proper; and

7 Q. Attorneys' fees and costs of suit, including expert fees and costs.

8 WHEREFORE, Plaintiffs on behalf of themselves and all members of the ERISA
9 Class, pray for relief as follows:

10 R. Certification of this action as a class action on behalf of the proposed
11 ERISA Class;

12 S. Designation of Plaintiffs as Representatives of the ERISA Class;

13 T. A declaration that the practices complained of herein violate ERISA
14 § 209(a), 29 U.S.C. § 1129(a);

15 U. Appropriate equitable and injunctive relief to remedy Defendant's
16 violations of ERISA § 209(a);

17 V. A declaration that Defendant has breached its fiduciary duties by failing to
18 credit the Plaintiffs and the ERISA Class with Compensation for all work performed, as required
19 by ERISA and the terms of the 401(k) Plan;

20 W. An order requiring that Defendant remedy its breaches of fiduciary duty by
21 crediting Plaintiffs and the ERISA Class with Compensation for all of their past, present, and
22 future uncompensated work;

23 X. Attorneys' fees and costs of suit; and

24 Y. Such other injunctive and equitable relief as the Court may deem
25 necessary, just, and proper.

26 WHEREFORE, Plaintiffs on behalf of themselves individually, pray for relief as
27 follows:
28

1 Z. Damages for breach of the SCPP contract; and

2 AA. Such other relief as the Court may deem necessary, just, and proper.

3 Respectfully submitted,

4
5 Dated: May 27, 2008

6 By: 

Kelly M. Dermody

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26 E-Mail: lvolpini@haberpolk.com

27 *Attorneys for Plaintiffs and the proposed Class*
28

DEMAND FOR JURY TRIAL

Plaintiffs hereby demand a jury trial on all causes of action and claims with respect to which they have a right to jury trial.

Respectfully submitted,

Dated: May 27, 2008

By: 
Kelly M. Dermody

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CIVIL COVER SHEET

ORIGINAL

JS 44 (Rev. 12/07) (and rev 1-16-08)

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON PAGE TWO OF THE FORM.)

I. (a) PLAINTIFFS

Martin Lewis and Aaron Cooper

JCS

DEFENDANTS

Wells Fargo & Co.

E-filing

(b) County of Residence of First Listed Plaintiff
(EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorney's (Firm Name, Address, and Telephone Number)

See attachment

County of Residence of First Listed Defendant

(IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE LAND INVOLVED.

Attorneys (If Known)

II. BASIS OF JURISDICTION (Place an "X" in One Box Only)

- ☐ 1 U.S. Government Plaintiff ☒ 3 Federal Question (U.S. Government Not a Party)
- ☐ 2 U.S. Government Defendant ☐ 4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)

- | | PTF | DEF | | PTF | DEF |
|---|----------------------------|----------------------------|---|----------------------------|----------------------------|
| Citizen of This State | <input type="checkbox"/> 1 | <input type="checkbox"/> 1 | Incorporated or Principal Place of Business in This State | <input type="checkbox"/> 4 | <input type="checkbox"/> 4 |
| Citizen of Another State | <input type="checkbox"/> 2 | <input type="checkbox"/> 2 | Incorporated and Principal Place of Business in Another State | <input type="checkbox"/> 5 | <input type="checkbox"/> 5 |
| Citizen or Subject of a Foreign Country | <input type="checkbox"/> 3 | <input type="checkbox"/> 3 | Foreign Nation | <input type="checkbox"/> 6 | <input type="checkbox"/> 6 |

IV. NATURE OF SUIT (Place an "X" in One Box Only)

CONTRACT	TORTS	FORFEITURE/PENALTY	BANKRUPTCY	OTHER STATUTES
<input type="checkbox"/> 110 Insurance <input type="checkbox"/> 120 Marine <input type="checkbox"/> 130 Miller Act <input type="checkbox"/> 140 Negotiable Instrument <input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment <input type="checkbox"/> 151 Medicare Act <input type="checkbox"/> 152 Recovery of Defaulted Student Loans (Excl. Veterans) <input type="checkbox"/> 153 Recovery of Overpayment of Veteran's Benefits <input type="checkbox"/> 160 Stockholders' Suits <input type="checkbox"/> 190 Other Contract <input type="checkbox"/> 195 Contract Product Liability <input type="checkbox"/> 196 Franchise	PERSONAL INJURY <input type="checkbox"/> 310 Airplane <input type="checkbox"/> 315 Airplane Product Liability <input type="checkbox"/> 320 Assault, Libel & Slander <input type="checkbox"/> 330 Federal Employers' Liability <input type="checkbox"/> 340 Marine <input type="checkbox"/> 345 Marine Product Liability <input type="checkbox"/> 350 Motor Vehicle <input type="checkbox"/> 355 Motor Vehicle Product Liability <input type="checkbox"/> 360 Other Personal Injury	PERSONAL INJURY <input type="checkbox"/> 362 Personal Injury—Med. Malpractice <input type="checkbox"/> 365 Personal Injury—Product Liability <input type="checkbox"/> 368 Asbestos Personal Injury Product Liability PERSONAL PROPERTY <input type="checkbox"/> 370 Other Fraud <input type="checkbox"/> 371 Truth in Lending <input type="checkbox"/> 380 Other Personal Property Damage <input type="checkbox"/> 385 Property Damage Product Liability	<input type="checkbox"/> 610 Agriculture <input type="checkbox"/> 620 Other Food & Drug <input type="checkbox"/> 625 Drug Related Seizure of Property 21 USC 881 <input type="checkbox"/> 630 Liquor Laws <input type="checkbox"/> 640 R.R. & Truck <input type="checkbox"/> 650 Airline Regs. <input type="checkbox"/> 660 Occupational Safety/Health <input type="checkbox"/> 690 Other	<input type="checkbox"/> 422 Appeal 28 USC 158 <input type="checkbox"/> 423 Withdrawal 28 USC 157 PROPERTY RIGHTS <input type="checkbox"/> 820 Copyrights <input type="checkbox"/> 830 Patent <input type="checkbox"/> 840 Trademark
REAL PROPERTY <input type="checkbox"/> 210 Land Condemnation <input type="checkbox"/> 220 Foreclosure <input type="checkbox"/> 230 Rent Lease & Ejectment <input type="checkbox"/> 240 Torts to Land <input type="checkbox"/> 245 Tort Product Liability <input type="checkbox"/> 290 All Other Real Property	CIVIL RIGHTS <input type="checkbox"/> 441 Voting <input type="checkbox"/> 442 Employment <input type="checkbox"/> 443 Housing/Accommodations <input type="checkbox"/> 444 Welfare <input type="checkbox"/> 445 Amer. w/Disabilities - Employment <input type="checkbox"/> 446 Amer. w/Disabilities - Other <input type="checkbox"/> 440 Other Civil Rights	PRISONER PETITIONS <input type="checkbox"/> 510 Motions to Vacate Sentence Habeas Corpus: <input type="checkbox"/> 530 General <input type="checkbox"/> 535 Death Penalty <input type="checkbox"/> 540 Mandamus & Other <input type="checkbox"/> 550 Civil Rights <input type="checkbox"/> 555 Prison Condition	LABOR <input checked="" type="checkbox"/> 710 Fair Labor Standards Act <input type="checkbox"/> 720 Labor/Mgmt. Relations <input type="checkbox"/> 730 Labor/Mgmt. Reporting & Disclosure Act <input type="checkbox"/> 740 Railway Labor Act <input type="checkbox"/> 790 Other Labor Litigation <input type="checkbox"/> 791 Empl. Ret. Inc. Security Act	<input type="checkbox"/> 400 State Reapportionment <input type="checkbox"/> 410 Antitrust <input type="checkbox"/> 430 Banks and Banking <input type="checkbox"/> 450 Commerce <input type="checkbox"/> 460 Deportation <input type="checkbox"/> 470 Racketeer Influenced and Corrupt Organizations <input type="checkbox"/> 480 Consumer Credit <input type="checkbox"/> 490 Cable/Sat TV <input type="checkbox"/> 810 Selective Service <input type="checkbox"/> 850 Securities/Commodities/Exchange <input type="checkbox"/> 875 Customer Challenge 12 USC 3410 <input type="checkbox"/> 890 Other Statutory Actions <input type="checkbox"/> 891 Agricultural Acts <input type="checkbox"/> 892 Economic Stabilization Act <input type="checkbox"/> 893 Environmental Matters <input type="checkbox"/> 894 Energy Allocation Act <input type="checkbox"/> 895 Freedom of Information Act <input type="checkbox"/> 900 Appeal of Fee Determination Under Equal Access to Justice <input type="checkbox"/> 950 Constitutionality of State Statutes
			SOCIAL SECURITY <input type="checkbox"/> 861 HIA (1395ff) <input type="checkbox"/> 862 Black Lung (923) <input type="checkbox"/> 863 DIWC/DIWW (405(g)) <input type="checkbox"/> 864 SSID Title XVI <input type="checkbox"/> 865 RSI (405(g))	FEDERAL TAX SUITS <input type="checkbox"/> 870 Taxes (U.S. Plaintiff or Defendant) <input type="checkbox"/> 871 IRS—Third Party 26 USC 7609
		IMMIGRATION <input type="checkbox"/> 462 Naturalization Application <input type="checkbox"/> 463 Habeas Corpus - Alien Detainee <input type="checkbox"/> 465 Other Immigration Actions		

V. ORIGIN

(Place an "X" in One Box Only)

- ☒ 1 Original Proceeding ☐ 2 Removed from State Court ☐ 3 Remanded from Appellate Court ☐ 4 Reinstated or Reopened ☐ 5 Transferred from another district (specify) ☐ 6 Multidistrict Litigation ☐ 7 Appeal to District Judge from Magistrate Judgment

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity):
FLSA (29 U.S.C. § 216) and ERISA (29 U.S.C. § 1132)

Brief description of cause:

Class action by technical support workers seeking overtime pay not paid due to misclassification as exempt

VII. REQUESTED IN COMPLAINT:

☒ CHECK IF THIS IS A CLASS ACTION UNDER F.R.C.P. 23 DEMAND \$ > \$5,000,000

CHECK YES only if demanded in complaint:
JURY DEMAND: ☒ Yes ☐ No

VIII. RELATED CASE(S) IF ANY

PLEASE REFER TO CIVIL L.R. 3-12 CONCERNING REQUIREMENT TO FILE "NOTICE OF RELATED CASE".

IX. DIVISIONAL ASSIGNMENT (CIVIL L.R. 3-2) (PLACE AND "X" IN ONE BOX ONLY)

☒ SAN FRANCISCO/OAKLAND ☐ SAN JOSE

DATE
May 28, 2008

SIGNATURE OF ATTORNEY OF RECORD

Attorneys

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